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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 911 52

ARCH R. EVERSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET ALS.,

Appellees

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

EDWARD R. BURKE,
CHALLEN B. ELLIS,
Counsel for Appellant.

IN THE

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I

We refer to appellant's Jurisdictional Statement for a fuller discussion of the points and authorities pertinent to argument in opposition to the Motion to Dismiss or Affirm.

II

In appellees' Statement as to Jurisdiction and Motion to Dismiss or Affirm it is stated (at page 11) as follows:

> "It is clear in the light of these rules that the Supreme Court of the United States, in denying the Writ of Certiorari, and in dismissing the appeal in the case of Gurney v. Ferguson, supra, (317 U. S. 588) was

> simply asserting that no substantial Federal question had been properly presented under the Fourteenth Amendment, * * *."

We respectfully submit that the inference drawn that the action of the Court in dismissing the appeal and denying certiorari was on the ground that the question involved was unsubstantial is not justified.

In the matter of the appeal, it was manifestly denied because appeal as of right is permitted only when the decision is in favor of the validity of the State statute and the decision of the Supreme Court of Oklahoma was against the validity of the State statute. This is made clear by the Court's reference to Section 344(a), Title 28, U. S. Code, as the reason for dismissal. Section 344(a) reads:

> "where there is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity, may be reviewed by the Supreme Court * * *."

As to the denial of the Writ of Certiorari, since the State Court held that the law violated the State constitution and this decision is conclusive and this Court has no power to review (*Haire* v. *Rice*, 204 U. S. 291, 301) the statute of the State would remain a nullity no matter what decision this Court should have rendered on the Federal constitutional question. So review of the decision below would have been futile so far as the statute of the particular state was concerned.

III

Both the appellant's and appellees' Statements as to Jurisdiction refer to the conflict of view in State decisions on the question of the constitutional validity of a statute authorizing the furnishing of free transportation to paro-

chial schools. This diversity of opinion among the highest courts of several states on the fundamental question involved and here presented, and the vigorous arguments in support of the opposing views, indicate very persuasively the importance, as well as the substantial character, of the constitutional question raised in this proceeding.

IV

Appellant respectfully submits that the Motion to Dismiss or Affirm should be denied.

Respectfully submitted,

EDWARD R. BURKE,
CHALLEN B. ELLIS,
Counsel for Appellant.